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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1450

IN THE MATTER OF RALPH E. COREY, *Petitioner*

PETITIONER'S REPLY MEMORANDUM

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Respondent's brief in opposition underscores the importance of review by this Court of the decision of the Supreme Court of Hawaii suspending petitioner from the practice of law.

1. Petitioner contends that the Sixth Amendment's Confrontation Clause was violated when he was disciplined without opportunity to confront his accusers before the same tribunal which was to decide his fitness to practice law. In answer, we are told that he had adequate opportunity to cross-examine at least some of his accusers in a prior civil suit where the stakes were entirely different, and that in the later disciplinary proceeding he had an opportunity to submit an "offer of proof." Neither answer suffices.

First, it is well established in recent decisions by thi Court—decisions pointedly neither discussed nor cite by respondent—that an opportunity to cross-examin in a prior proceeding satisfies the requirements of th Confrontation Clause *only* when the previously exam ined witness is unavailable at the second proceedin through no fault of the State.[1] The Attorney Genera does not, and cannot, contend that in this case the wit nesses—Brown, Young and Campbell (who did no testify in the prior proceeding)—were "unavailable." Under such decisions as *California* v. *Green*, 399 U.S 149 (1970), *Barber* v. *Page*, 390 U.S. 719 (1968) an *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972), the failur of the State to produce petitioner's accusers for exam ination in the same tribunal that was considering hi disbarment or suspension from practice deprived hin of his rights under the Confrontation Clause of th Sixth Amendment.

That petitioner had an opportunity in the discipli nary proceeding to make an "offer of proof" does no cure the court's failure to allow him to subject hi accusers to the harsh light of cross-examination i that same proceeding. As our petition for certiora noted (at page 14), as the record indicates, and a respondent is unable to deny, petitioner was afforde

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[1] As former Solicitor General Griswold summarized the cases i 1971 the Confrontation Clause permits admission of "prior r corded testimony when the witness is dead or when he is current present and subject to cross-examination." Griswold, "The D Process Revolution and Confrontation," 119 U.Pa.L.Rev. 711, 7 (1971). In so doing, he accurately anticipated this Court's d cision in *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972), that a findi of unavailability of the accuser whose prior recorded testimony sought to be used is a "requirement of the confrontation claus

the opportunity only to make a *written* offer of proof. When he, in writing, inquired of the court below whether he would be permitted to examine live witnesses, he was advised, in writing, that he would not, that "no testimony will be adduced." (Record 517, 523). All the process *ever* afforded petitioner was the right to file legal memoranda, plus thirty minutes of oral argument. Neither the Due Process Clause nor the Confrontation Clause permits an attorney to be disciplined in such a manner, particularly where, as here, the case turned upon the veracity of a witness' oral testimony.[2] See *Goldberg* v. *Kelly*, 397 U.S. 254, 266-70 (1970). That is the teaching of *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963), and the long line of cases under the Confrontation Clause discussed in the petition but ignored by respondent. The fact is that respondent has from the outset misconceived the meaning of confrontation; it does not understand that the Clause entitles an accused to test the recollection and veracity of his accuser in the presence of his judges "in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895). Accordingly, respondent success-

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[2] An offer of proof would have added nothing to the record. Petitioner's written submissions had already made clear the nature of his defense—that he was not guilty of fraud, that his role was not as described by Brown or Young, and that Brown did not tell the truth when he testified that he had relied upon the amount of the contract rather than upon an independent appraisal of the property. The issue was who to believe—petitioner, on the one hand, or Brown, and to a lesser extent, Young and Campbell? The conflict could only be resolved on the basis of cross-examination and observation of demeanor.

fully urged the court below to act upon the record o
the prior law suit without fresh opportunity to see an
hear live witnesses. Petitioner's judges did not se
or hear either Brown, or Young or Campbell. Unde
an erroneous interpretation of the Confrontatio
Clause—more accurately, in a misguided belief that di
barment proceedings are not "adversarial"—the
accepted their prior recorded testimony and, perhap
their ex parte submissions, dispensing with live test
mony. That was error, of constitutional dimension.

2. Petitioner also contends that contrary to *In I*
Ruffalo, 390 U.S. 544 (1968), the Hawaii Suprem
Court charged him with misconduct under one sta
dard, then suspended him from practice under anothe
not previously cited. Respondent tacitly concedes th
accuracy of this contention, but argues that petitione
did have timely notice of the "transaction" involved-
that is, the alleged fraud in connection with the valu
of the construction contract. But the same could
said about *Ruffalo.* John Ruffalo knew the facts upo
which the court was focusing, but he was not apprise
from the outset of the precise legal standard by whic
his conduct would ultimately be measured. There,
here, a mid-stream switch in legal theory amounted to
denial of due process.

3. Petitioner contends, finally, that he was denie
his right to trial by a fair tribunal when the Hawa
Supreme Court condemned him publicly in reviewin
a prior civil proceeding, repeatedly received surrepti
tious ex parte communications attacking petitioner, an
then proceeded to ignore its own rules and "try" th
case itself. Respondent defends on the tenuously rel
vant ground that a judge need not disqualify himse

because of derogatory information he has become aware of in the course of another judicial proceeding. That is no answer here. Petitioner's contention that the tribunal in this case was tainted by ex parte attacks is not denied. And there is no adequate explanation why the court reached out to "try" this disciplinary proceeding, something it had never done before, rather than confine itself to its usual appellate function.

* * *

We are assured, in the last sentence of respondent's brief, that it is "unlikely" that the Hawaii Supreme Court will do any of these things to another attorney. That is little consolation to petitioner. Moreover, it is tantamount to an admission that what happened here never should have happened. Yet respondent concedes that under Hawaii law, the Supreme Court remains free to ignore its amended rules and do to another what it did to petitioner. And respondent's brief demonstrates that no-one can rely on the Attorney General properly to interpret the Confrontation Clause with respect to disciplinary proceedings.

Petitioner had no trial below. His defense was restricted, by order of the court, to written submissions and thirty minutes of oral argument. Because the proceeding was commenced, contrary to Hawaii practice, in the state Supreme Court, petitioner has had no opportunity for appellate review. Mr. Justice Brennan has recently reminded us that this Court values the right of litigants to obtain at least one level of appellate review, that this concern motivates the Court to hear argument in cases where there would otherwise be no appellate review. In "The National Court of Appeals: Another Dissent," 40 U.Chi. L.Rev. 473,

474 (1973), the Justice wrote in connection with this Court's policy of setting oral argument in cases under the Expediting Act:

> "we are regularly constrained to grant review, not so much because the question presented is especially important or because the District Court may well have erred, but rather because we are reluctant to deprive the losing litigant of any opportunity for appellate review of the trial court's decision."

In the present case, this constraint is reinforced by the circumstance that petitioner not only has had no appellate review, but no trial either. Moreover, the questions raised by his petition *are* "especially important."[3] And the Court below did err.

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[3] Although the Attorney General now suggests that the issues are unimportant and do not warrant review by this Court, he took quite another tack when petitioner sought a federal court injunction against commencement of this original proceeding in the Supreme Court of Hawaii. In his brief in the U. S. Court of Appeals for the Ninth Circuit, dated February 5, 1973, the Attorney General contended that "even in the unlikely event that improper standards are applied by the Hawaii Supreme Court, Appellant could seek review by the Supreme Court of the United States by petition for writ of certiorari. The appropriateness of this route was discussed in *Erdmann* [v. *Stevens*, 458 F.2d 1205, 1211 (2d Cir. 1972)]:

> 'Undoubtedly because of general recognition of the advisability of permitting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional manner of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages.' "

Answering Brief, p. 8, *Corey* v. *Richardson*, No. 72-3033 (9th Cir. 1973).

A writ of certiorari should be granted if the Due Process and Confrontation Clauses are to have any meaning in lawyers' disciplinary proceedings.

Respectfully submitted,

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